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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOE ANTHONY LUNA, Petitioner.	2 CA-CR 2009-0346-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-38383

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

The Ferragut Law Firm, P.C.
By Ulises A. Ferragut, Jr. — Phoenix
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Joe Anthony Luna was charged with first-degree murder and kidnapping. In 1993, in exchange for the state's agreement not to seek the death penalty on the murder charge, Luna pled guilty to both charges pursuant to a plea agreement. The trial court sentenced him to a life term of imprisonment for the murder conviction,

without the possibility of parole for twenty-five years, followed by a consecutive, aggravated prison term of twenty-one years on the kidnapping conviction. Luna sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., challenging the validity of the plea and the trial court's characterization of the judgment of guilt as a judgment of garnishment and claiming trial counsel had been ineffective. The trial court denied relief after an evidentiary hearing, and on review this court agreed the trial court could not garnish funds in the custody of the Arizona Department of Corrections, granting relief on that claim but denying relief on the remaining claims. *State v. Luna*, No. 2 CA-CR 94-0390 (memorandum decision filed Mar. 23, 1995). In the petition for review now before us, Luna contends the trial court erred when it summarily dismissed his second Rule 32 petition in which he challenged the sentence on the kidnapping conviction based on the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004).

¶2 Absent a clear abuse of discretion, we will not disturb the trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). The trial court correctly concluded that Luna is not entitled to relief based on a significant change in the law, *see* Ariz. R. Crim. P. 32.1(g), because *Blakely* is not retroactively applicable and Luna's case was already final when the Supreme Court decided *Blakely* in June 2004. *See State v. Febles*, 210 Ariz. 589, ¶ 17, 115 P.3d 629, 635 (App. 2005) (*Blakely* not retroactive; applicable only to convictions "not yet final" at time *Blakely* decided); *see also State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (conviction final when judgment of conviction rendered, appeal

exhausted, and time for filing petition for certiorari to Supreme Court passed or certiorari denied).

¶3 Luna has not persuaded us on review that the trial court erred in reaching that conclusion and rejecting his contentions that *Blakely* articulated a new, higher burden of proof for establishing the existence of aggravating circumstances in a noncapital case and that, despite *Febles*, it should be applied retroactively to his case. Although the trial court went on to find the sentence was proper, even assuming *Blakely* were to be given retroactive effect, we do not address the propriety of that portion of the court's ruling.

¶4 We grant the petition for review but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge